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February 17, 1998

Magalie Roman Salas, Esq.
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Implementation of Section 309 of the Communications Act
MM Docket No. 97-234
GC Docket No. 92-52
GEN Docket No. 90-264

Dear Ms. Salas:

Submitted herewith for filing, on behalf of our client, Simon T, are an original and four (4) copies of his Reply Comments in the above-referenced rulemaking proceeding.

Please direct any inquiries concerning this submission to the undersigned.

Respectfully submitted,

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER, LLP

By: Irving Gastfreund
Irving Gastfreund

Enclosures

DOC. #12156419.DC

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 309(j) of the	)	MM Docket No. 97-234
Communications Act -- Competitive Bidding	)	
for Commercial Broadcast and Instructional	)	
Television Fixed Service Lenses	)	
	)	
Reexamination of the Policy Statement on	)	GC Docket No. 92-52
Comparative Broadcast Hearings	)	
	)	
Proposals to Reform the Commission's	)	GEN Docket No. 90-264
Comparative Hearing Process to	)	
Expedite the Resolution of Cases	)	

TO: The Commission

REPLY COMMENTS OF SIMON T

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February 17, 1998

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Summary

The Commission is statutorily prohibited from summarily dismissing any previously-accepted broadcast applications which challenge a broadcast license renewal application. In addition, the Commission is precluded by applicable law from adopting its proposed two-step hearing procedure for resolving comparative broadcast renewal proceedings involving a license renewal application tendered for filing with the Commission on or before May 1, 1995. There is no basis for the speculation that a court might be persuaded to overrule the decision in Citizens Communications Center v. FCC, 447 F.2d 1201 (D.C. Cir. 1971), clarified, 463 F.2d 822 (D.C. Cir. 1972). The Commission should adopt modified comparative criteria as a policy statement to govern comparative broadcast renewal proceedings for pre-May 1, 1995 license renewal applications and for applications challenging them.

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Lenses	)	MM Docket No. 97-234
	)	
Reexamination of the Policy Statement on Comparative Broadcast Hearings	)	GC Docket No. 92-52
	)	
Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases	)	GEN Docket No. 90-264

TO: The Commission

REPLY COMMENTS OF SIMON T

SIMON T, by his attorneys, pursuant to Sections 1.415 and 1.419 of the Commission's Rules, hereby submits his instant Reply Comments with respect to certain Comments filed in this proceeding on January 26, 1998, in response to the Commission's Notice of Proposed Rulemaking in this proceeding, ____ FCC Rcd ____, FCC 97-397 (released November 26, 1997)[1] ("NPRM"). In support whereof, it is shown as follows:

I. Introduction

In its NPRM, the Commission seeks comment on proposed competitive bidding procedures that will apply to mutually-exclusive applications for licensees for commercial AM

[1] See 62 Fed. Reg. 65392 (December 12, 1997).

radio, FM radio, analog television, low power television, FM translator, and television translator services. The proposed broadcast auction procedures were designed to implement the Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251 (1997), signed into law on August 5, 1997, which expanded the Commission's competitive bidding authority under Section 309(j) of the Communications Act. In its NPRM, the Commission found that

> "... auctions are not a legally available option in pending competitive renewal proceedings.... [W]e believe we lack authority to conduct a competitive bidding procedure pursuant to Section 309(j) [of the Communications Act]."
>
> NPRM, supra, at ¶101.

Based on the foregoing, in its NPRM, the Commission proposed to adjudicate comparative renewal cases in which the comparative issue is decisionally significant by using a so-called "two-step" procedure, analogous to that which had been developed by the Commission for comparative cellular renewal proceedings in Amendment of Part 22 of the Commission's Rules Relating to Renewals In The Domestic Public Cellular Radio Television Service, 8 FCC Rcd 2834 (1993), recon. denied, 8 FCC Rcd 6288 (1993) ("Cellular Order"). Under that approach, the Commission would grant the incumbent licensee's application for renewal of license without a full comparative hearing if the Commission determined in a threshold hearing that the renewal applicant deserved a renewal expectancy for "substantial performance" during the license term. Consequently, the Commission solicited public comment on whether such a two-step approach, which would be analogous to the procedures for new renewal cases set forth in Section 309(k) of the Communications Act, is judicially sustainable. NPRM at ¶102. In addition, the Commission's NPRM also solicited public comment on whether, as an alternative to the two-step procedure, or in conjunction with any two-step hearing that reaches the second

stage, the Commission should consider any comparative factors raised by the applicant on a case-by-case basis. NPRM at ¶103.

II. Interest of Simon T In This Proceeding

Simon T is an applicant (File No. BPCT-931101KF) for a construction permit for a new UHF television station on Channel 40 in Santa Ana, California. Mr. T's application is mutually-exclusive with the pending application (File No. BRCT-930730KF) of Trinity Christian Center of Santa Ana, Inc. d/b/a Trinity Broadcasting Network ("Trinity"), licensee of Television Station KTBN-TV, Channel 40, Santa Ana, California. In addition, Mr. T's application is mutually-exclusive with the pending application (File No. BPCT-931028KS) of Maravillas Broadcasting Company ("Maravillas") for a construction permit for a new UHF television station on Channel 40 in Santa Ana, California. Joint Comments were filed in this proceeding on January 26, 1998, on behalf of Trinity and certain other parties ("Joint Comments"), in which the aforementioned comparative renewal issues were addressed. Indeed, Mr. T was mentioned by name on page 2 of those Joint Comments.

Manifestly, Simon T's perspective on the comparative renewal matters raised by the Commission in its NPRM herein, as articulated below, are fundamentally at odds with the perspective of Trinity. Consequently, Mr. T's instant Reply Comments, submitted, in part, to respond to the Joint Comments of Trinity, will materially assist the Commission in its resolution of the comparative renewal issues raised in this proceeding. Thus, Simon T has a direct and

substantial interest in the outcome of this proceeding, and his instant Reply Comments will prove valuable to the Commission in resolving the matters which are here under examination.

III. The Commission is Precluded By Applicable Law From Summarily Dismissing Any Previously Accepted Applications Challenging Renewals and From Adopting Its Proposed Two-Step Hearing Procedure For Resolving Comparative Renewal Proceedings

A. Summary Dismissal of Accepted Pre-May 1, 1995 Applications Is Prohibited

For decades, the Commission has entertained competing applications in the license renewal context.[2] Under long-established comparative renewal procedures, if one or more competing applications were filed with respect to an incumbent license renewal applicant, the Commission was required to consider the applications comparatively in a single consolidated comparative, trial-type evidentiary proceeding to determine which of the applicants would best serve the public interest, convenience and necessity. See Second Further Notice of Inquiry and Notice of Proposed Rule Making in BC Docket No. 81-742, 3 FCC Rcd 5179, 5185-86 (1988). The Commission was thus required to afford both incumbent license renewal applicants and competing mutually-exclusive applicants a full comparative hearing, under Section 309(e) of the Communications Act. See Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945). See, also, Citizens Communications Center v. FCC, 447 F.2d 1201 (D.C. Cir. 1971), clarified, 463 F.2d 822 (D.C. Cir. 1972).

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[2] For a history of the comparative renewal process, see Second Further Notice of Inquiry and Notice of Proposed Rule Making in BC Docket No. 81-742, 3 FCC Rcd 5179, 5186-88 (1988).

On February 8, 1996, President Clinton signed into law the Telecommunications Act of 1996, which, inter alia, adopted a new Section 309(k) of the Communications Act which effectuated a major change in the way that the Commission is required to process license renewal applications and applications that would challenge those renewal applications. In particular, the new statute eliminated future consolidated comparative renewal hearings and directed the Commission to grant a broadcaster's license renewal application if certain statutorily-established renewal standards were met.

With respect to broadcast license renewal applications filed after May 1, 1995, Section 204(c) of the Telecommunications Act of 1996 eliminated consolidated comparative renewal hearings and established, instead, a new two-step license renewal procedure and codified specific standards for the Commission to apply in considering a broadcaster's license renewal application. More specifically, Section 309(k) of the Communications Act now provides as follows:

> (1) If the licensee of a broadcast station submits an application to the Commission for renewal of that station's license, the Commission must grant the application if it finds, with respect to that station that, during the preceding term of its license:
>
> > (a) the station has served the public interest, convenience, and necessity;
> >
> > (b) there have been no serious violations by the licensee of the Communications Act or the Commission's rules or regulations; and
> >
> > (c) there have been no other violations by the licensee of the Communications Act of the Commissions rules and regulations which, taken together, would constitute a pattern of abuse.
>
> (2) If any licensee of a broadcast station fails to meet the requirements set forth above, the Commission may deny the renewal application in accordance with Paragraph (3)

below, or grant such application on such terms and conditions as are appropriate, including renewal for a term less than the maximum otherwise permitted.

(3) If the Commission determines, after notice and opportunity for a hearing as provided for in Section 309(e) of the Communications Act, that a licensee has failed to meet the requirements specified in Paragraph (1) above and that no mitigating factors justify the imposition of lesser sanctions, the Commission must:

> (a) issue an order denying the license renewal application filed by the incumbent; and
>
> (b) only thereafter the Commission must accept and consider such applications for a construction permit as may be filed specifying the channel or broadcasting facilities of the former licensee.

(4) In making the determinations specified in Paragraphs (1) or (2), above, the Commission is prohibited from considering whether the public interest, convenience, and necessity might be served by the grant of a license to a person other than the renewal applicant.

In Implementation of Sections 204(a) and 204(c) of the Telecommunications Act of 1996 (Broadcast License Renewal Procedures), 11 FCC Rcd 6363 (1996), the Commission adopted rules to implement Section 204 of the Telecommunications Act of 1996 and the new Section 309(k) of the Communications Act. In particular, the Commission adopted a new Section 1.227(b)(6) of the Commission's Rules, which provides as follows:

> "An application which is mutually exclusive with an application for renewal of license of a broadcast station filed on or before May 1, 1995 will be designated for comparative hearing with such license renewal application if it is substantially complete and tendered for filing not later than the date prescribed in §73.3516(e)."

Furthermore, in Implementation of Sections 204(a) and 204(c) of the Telecommunications Act of 1996 (Broadcast License Renewal Procedures), supra, the Commission adopted a new Section 73.3516(e) of its Rules, which provides, inter alia, that an application for a construction permit for a new broadcast station will not be accepted for filing if

it is mutually-exclusive with an application for renewal of license of an existing broadcast station unless the application for renewal of license is filed with the Commission on or before May 1, 1995, and unless the mutually-exclusive construction permit application is tendered for filing by the end of the first day of the last full calendar month of the expiring license term.

As noted above, Simon T's above-referenced pending application for Santa Ana, California has been filed with respect to Trinity's pre-May 1, 1995 license renewal application for Television Station KTBN-TV. Hence, under Section 204 of the Telecommunications Act of 1996 and under the Rules adopted by the Commission to implement those provisions, Simon T's application is entitled to a full, consolidated comparative, trial-type evidentiary hearing with the respective applications of Trinity and Maravillas, since all those applications were tendered for filing with the Commission in 1993 -- i.e., well before the May 1, 1995 cut-off date established by Congress in its 1996 revision to Section 309 of the Communications Act.

Under these circumstances, there is simply no merit to the allegations of Trinity, in its Joint Comments of January 26, 1998, to the effect that the Commission should summarily dismiss all applications which compete with the respective license renewal applications of incumbent licensees. See Joint Comments at n.2. Plainly, Congress has fully considered the issue of how the Commission must treat comparative renewal proceedings and has clearly spoken on the matter in Section 204 of the Telecommunications Act of 1996, discussed above. As shown above, with respect to broadcast renewal applications (such as Trinity's license renewal application for KTBN-TV) filed with the Commission prior to May 1, 1995, and with respect to applications which compete with such license renewal applications (such as Simon T's

application for Santa Ana, California) the full, consolidated comparative hearing requirement of Section 309(e) of the Communications Act continues to govern. See Ashbacker Radio Corp. v. FCC, supra. Congress has explicitly stated, however, that only with respect to license renewal applications filed after May 1, 1995, will the new two-step renewal process set forth in Section 309(k) govern. Hence, Congress has clearly spoken and has established how applications which relate to an incumbent's broadcast license renewal application are to be treated by the Commission. Under the Congressional framework, there is absolutely no basis whatsoever for summary dismissal of applications which are competitive with a pre-May 1, 1995 license renewal application for a broadcast station.

The Commission simply has no statutory authority to adopt Trinity's proposed plan for summary dismissal of competing broadcast applications, particularly where a challenging application (such as that of Simon T for Santa Ana, California) has been solicited by the Commission, has been accepted for filing by the agency adn where the acceptance for filing became a "final order" long ago. Simon T's application is a valuable right which cannot lawfully be extinguished by the summary dismissal procedure suggested by Trinity. Whatever the power that the Commission might have to set basic qualifications standards and to deny hearings to applicants who failed to meet the minimum qualifications established in the Communications Act, nonetheless, the Commission may not lawfully deny a qualified applicant, such as Simon T, where the underlying applications were tendered for filing well before May 1, 1995, a full hearing on the challenger's own merits. See United States v. Storer Broadcasting Co., 351 U.S. 192 (1956); Citizens Communications Center v. FCC, FCC, 447 F.2d at 1211-13.

B. The Commission Is Prohibited From Adopting Any "Two-Step" Comparative Renewal Procedure For Applications Filed Prior To May 1, 1995

As noted above, Congress itself has already resolved the merits of the comparative renewal issue -- expressly and definitively -- by establishing a bright-line "cut-off" date of May 1, 1995 for the prospective commencement of a two-step comparative renewal process for broadcast applications. Under these circumstances, there is no controversy as to what the Congressional intent was[3]; to the contrary, Congressional intent is clear and unequivocal, and the Commission is therefore statutorily precluded from imposing any two-step hearing procedure with respect to license renewal applications and applications competing with such renewal applications where the renewal application was tendered for filing with the Commission on or before May 1, 1995. See Section 309(k) of the communications Act; Sections 1.227(b)(6) and 73.3516(e) of the Commission's Rules; Implementation of Sections 204(a) and 204 (c) of the Telecommunications Act of 1996 (Broadcast License Renewal Procedures), supra, 11 FCC Rcd 6363 (1996). Plainly, the Commission is duty-bound to adhere to Congressional mandate and to its rules.

Under these circumstances, there is no merit whatsoever to the Commission's contemplated reliance on its Cellular Order, supra, with respect to pre-May 1, 1995 license renewal applications and applications which challenge such renewal applications. Under the

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[3] The clarity and precision of the Congressional scheme in this instance is thus distinguishable from the more difficult issue which is presented where Congressional intent is not clear. Cf. Telecommunications Research and Action v. FCC, 801 F.2d 501, 517-18 (D.C. Cir. 1986).

approach contemplated by the Cellular Order, the Commission would grant such a renewal application without a comparative hearing if it determined in a threshold hearing that the renewal applicant deserved a "renewal expectancy" for "substantial" performance during the license term, consistent with precedent established in Central Florida Enterprises, Inc. v. FCC, 683 F.2d 503, 509 (D.C. Cir. 1982), cert denied, 460 U.S. 1084 (1983) and its progeny. In its Paragraph 102 of its instant NPRM, the Commission itself questioned whether such a two-step comparative renewal approach (which would be analogous to the procedures for post May 1, 1995 renewal cases, as set forth in Section 309(k) of the Communications Act) is judicially sustainable. In this regard, the Commission cited to its Cellular Order, in which the Commission speculated that a court might be persuaded to overrule Citizens Communications Center v. FCC, supra, in which the U.S. Court of Appeals for the District of Columbia Circuit held that a similar two-step procedure developed by the Commission for then-pending comparative broadcast renewal proceedings[4] was contrary to the "full hearing" requirements of Section 309(e) of the Communications Act. See Ashbacker Radio Corp v. FCC, supra.

As a preliminary matter, in light of the provisions of Section 309(k) of the Communications Act and the Commission's Rules thereunder, it is of no consequence what the Commission may have reasoned prior to the February 8, 1996, enactment of the Telecommunications Act of 1996. Consequently, with respect to pre-May 1, 1995 license renewal applications and applications competing with such renewal applications, the Commission's reasoning in its Cellular Order, supra, (released April 9, 1993) is no longer

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4 Policy Statement on Comparative Hearings Involving Regular Renewal Applicants, 22 FCC 2d 425 (1970) (hereinafter "1970 Policy Statement").

germaine to the issue here under consideration. Indeed, it is simply academic speculation for the Commission to question whether a court might be persuaded to overrule Citizens Communications Center v. FCC. The determinations by Congress embodied in Section 309(k) of the Communications Act render any such speculations to be of no probative value.

In any event, however, unless and until the U.S. Court of Appeals overrules the decision in Citizens Communications Center v. FCC, supra, or unless and until that decision is reversed by the U.S. Supreme Court, the decision stands as good law with respect to broadcast license renewal applications filed with the Commission on or before May 1, 1995 and with respect to applications challenging those renewal applications. Manifestly, such applications are entitled, under Citizens Communications Center, to a full, consolidated, comparative, trial-type evidentiary hearing. The Commission's speculations about what a court might do with respect to overruling Citizens Communications Center v. FCC are simply moot at this time, in light of Section 309(k) of the Communications Act.

In any event, however, there is no basis to the Commission's speculation that a court might be persuaded to overrule Citizens Communications Center v. FCC. There is simply no question that that case rejected the Commission's proposed two-step renewal procedure for comparative broadcast renewal applications, on the ground that such a procedure would violate the challenger's right to a full hearing under Section 309(e) of the Communications Act and under Ashbacker Radio Corp. v. FCC, supra. It is virtually impossible to envision how this later decision, involving statutory interpretation by a federal court, could be viewed as wrongly-decided, where, as here, the full hearing requirement of Section 309(e) of the Communications

Act still applies to pre-May 1, 1995 broadcast license renewal applications and to their challengers.

Moreover, the Commission itself, in its Cellular Order, recognized expressly that there was a clear distinction to be drawn between a two-step comparative renewal procedure in the broadcast arena, on the one hand, and, on the other hand, a proposed two-step license renewal procedure in the common carrier licensing arena. In this connection, the Cellular Order noted as follows:

> "Significantly, the procedure rejected by Citizens foreclosed the Commission from considering an important public interest goal of comparative broadcast proceedings for initial licensees, namely, the encouragement of diverse ownership of mass media outlets. [Footnote omitted.] ... With regard to the diversity of ownership goal, the Commission assumes a linkage between media ownership and programming by a broadcast licensee. See Citizens, 447 F.2d at 1213-14, n. 36. In fact, Citizens stated that the Supreme Court has recognized 'on numerous occasions' the distinct connection between diversity of ownership of the mass media and the 'diversity of ideas and expression required by the First Amendment." Id. Thus, in a comparative broadcast renewal case, even after a renewal expectancy is awarded and given the greatest weight, there is still a public interest issue to be examined that could conceivably outweigh the renewal expectancy. In cellular radio comparative renewal proceedings, which involve common carrier service, there is no analogous potential viewpoint diversity issues or concerns. There is no question that the Commission has traditionally distinguished between broadcasting and common carrier service on First Amendment grounds; that is, the difference between a license granting the holder content control (the broadcaster) and a license involving the provision of a conduit to others for communications (common carrier). See, e.g., Network Project v. FCC, 511 F.2d 786, 795 (D.C. Cir. 1975), where the court rejected petitioners' effort to import the First Amendment concepts applicable to broadcasters into a common carrier context. We note that nothing discussed here should be construed to affect our broadcast comparative renewal hearing proceedings on standards." Cellular Order, supra, 8 FCC Rcd 2834, 2838 (1993).

In short, the speculation by the Commission concerning Citizens Communications Center in its Cellular Order have no applicability to broadcast comparative renewal proceedings, such as those which are here under examination.

In any event, however, there is no basis to the remuninations in the Cellular Order to the effect that Citizens Communications Center v. FCC, FCC, may no longer represent the current thinking of the U.S. Court of Appeals or the District of Columbia Circuit. Cellular Order at 2838. Indeed, the cases cited in the Cellular Order plainly and consistently reiterate that, where two bona fide applications are mutually-exclusive, the grant of one without a hearing to both deprives the loser of the opportunity which Congress chose to give it". Hispanic Information & Telecommunications Network, Inc. v. FCC, 865 F.2d 1289, 1294 (D.C. Cir. 1989) (quoting Ashbacker Radio Corp. v. FCC, supra; see also, Altamont Gas Transmission Co. v. FCC, 965 F.2d 1098, 1100 (D.C. Cir. 1992).

Although the Cellular Order acknowledges that, as of the date of its release, the respective decisions in Citizens and Ashbacker continued to be applicable law, nonetheless, the Cellular Order seized upon the predicate that the Commission is entitled to set basic qualifications standards for applicants and to deny hearings to applicants found to be basically unqualified. Cellular Order at 2838. However, while both Ashbacker and Citizens recognized this ability on the part of the Commission,[5] this narrowly-drawn exception cannot lawfully be used by the Commission to justify adoption of a two-step comparative renewal procedure for pre-May 1, 1995 license renewal applications and those applications which challenge them. Instead

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[5] See Citizens Communications Center v. FCC, 447 F.2d at 1213 n. 34.

of establishing a "basic qualifications" standard which would entitle the challenger to a full hearing, the two-step procedure adopted for cellular renewal applicants denies the challenging applicant a hearing entirely if the incumbent meets certain criteria. See Cellular Order at 2837-38. The Commission's presently-proposed two-step procedure turns the narrowly-framed exception for establishing basic qualifications into a virtually insurmountable obstacle which overwhelmingly would disadvantage a challenger and favor an incumbent. By its very terms, the exception depends on the basic qualifications of the challenger and not on the performance of the incumbent. Although it is possible that a challenger could lose its right to hearing if it is deemed to be basically unqualified to hold a license, nonetheless, it would be contrary to the right to a full hearing, embodied in Section 309(e) of the Communications Act, to hold that a challenger could lose its right to such a hearing if the incumbent is deemed to be basically qualified.

Indeed, the cases relied upon by the Commission in its discourse in the Cellular Order do not support any sweeping expansion of the sort alluded to by the Commission. In Altamont Gas Transmission Co. v. FERC, supra, the court upheld the denial of a hearing to one party when the party failed to file the requisite proof that it had submitted all necessary applications to the agency. See 965 F.2d 1098, 1100 - 01 (D.C. Cir. 1992). In Hispanic Information & Telecommunications Network, Inc. v. FCC, supra, the court upheld the requirement that basic qualifications standards be applied equally to all parties. 865 F. 2d at 1294. In Public Utilities Commission of California v. FERC, the court upheld the two-track application system in which all applicants were entitled to a hearing. See 900 F.2d 269, 273, 278. See, also, Nuclear

Information Recourse Service v. NRC, 969 F.2d 1169 (D.C. Cir., 1992) (hearing required).[6] In short, while the Commission certainly has the power to establish reasonable threshold requirements with respect to applicants, the Commission may not lawfully require that one must be an incumbent broadcaster in order to merit a hearing, at least with respect to broadcast licensee renewal applications filed prior to May 1, 1995 and applications which challenge such renewal applications.

In light of the foregoing, there is no merit to the suggestions by the Commission and by Trinity in its Joint Comments, that the Commission may lawfully adopt a two-step comparative renewal process with respect to pre-May 1, 1995 broadcast license renewal applications (such as that of KTBN-TV) and with respect to applications (such as that of Simon T) which challenge such renewal applications, particularly where such challenging applications were on file prior to May 1, 1995.

Furthermore, there is no merit to the ludicrous suggestion by Trinity that a two-step comparative renewal process should be adopted with respect to comparative broadcast proceedings involving applications of challengers which are determined not to be "bona fide". According to Trinity, a hearing on the incumbent licensee's entitlement to a renewal expectancy would be "superfluous and wasteful". Joint Comments at 5. Of course, Trinity neglects to draw the needed distinction between pre-May 1, 1995 license renewal applications and those filed after

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[6] The Cellular Order's reliance on Mobil Oil Exploration & Producing Southeast, Inc. v. United Distribution Cos., 111 S.Ct. 615, 625-26 (1991) is misplaced, since the statute at issue in that proceeding did not even require the agency to hold a "full hearing", nor did it require the agency to make specific findings of fact with regard to each distributed situation.

that date. See discussion, supra. Furthermore, not surprisingly, Trinity neglects to mention precisely how the Commission would reach a determination that an applicant is or is not "bona fide". Clearly, the only way that the matter can be properly resolved is in the context of an evidentiary, trial-type, on-the-record hearing proceeding, which is the appropriate venue for resolution of substantial and material questions of fact. Plainly, Trinity is attempting to summarily "sweep under the rug" all potential competition to an incumbent broadcast renewal applicant.[7]

IV. The Commission Should Adopt Modified Comparative Criteria As A Policy Statement to Govern Comparative Broadcast Renewal Proceedings for Pre-May 1, 1995 License Renewal Applications and Applications Challenging Them

As an alternative to the two-step comparative renewal procedure, the Commission should continue to resolve broadcast license renewal applications tendered for filing on or before May 1, 1995, as well as competing applications, on a case-by-case basis. While it is recognized that such a new policy statement would govern only a relatively small number of applications, in light of the legislative pronouncement in Section 309(k) of the communications Act, that statutory provision compels such a result, for the reasons set forth hereinabove.

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[7] Under Trinity's proposal: "The fact that an applicant's principals have previously declined to provide service for which they have sought and obtained the authority to provide is a wholly objected measure that is related to and completely undercuts the reliability of the applicant's proposed public service. Parties who have evidenced such a predilection to sell out their public interest proposals in the past do not warrant Commission tolerance and the expenditure of Commission resources to do so again." Joint Comments at 6. All substantial and material questions of fact relating to an applicant entitled to a hearing need to be addressed in an evidentiary, trial-type hearing, which can properly resolve substantial and material questions of fact. Summarily disposition of any abdication would be wholly unlawful. The bona fides of an applicant could well be a substantial and material question of fact, both as to an incumbent licensee, as well as to a challenger.

A possible impediment to adoption of comparative criteria for pre-May 1, 1995 renewal applications and for challengers is the Court of Appeals' decisions in Bechtel v. FCC, 957 F.2d 873 (D.C. Cir. 1992); Flagstaff Broadcasting Foundation v. FCC, 979 F.2d 1566 (D.C. Cir. 1992); ant Bechtel v. FCC, 10 F.3d 875 (D.C. Cir. 1993), in which the Court of Appeals held that the Commission is precluded from continuing to rely on the comparative factor of integration of ownership and management in resolving comparative broadcast proceedings.[8]

Under these circumstances, the Commission should continue to resolve pre-May 1, 1995 comparative renewal proceedings on a case-by-case basis, consistent with existing law, but without reference to any criterion of integration of ownership and management. Specifically, leaving aside issues relating to basic character qualifications, the comparative criteria should consist of the following: [9]

1. Broadcast experience;
2. Broadcast record;
3. Local residence by owners in the proposed service area;
4. Civic activity in the proposed service area by parties in the applicant;
5. Most efficient use of the frequency;
6. Diversification of control of mass communications media facilities;

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[8] Analyses under the integration of ownership and management factor had involved a complex, two-step process, whereby the applicant was awarded quantitative credit reflecting the total ownership interests of those with managerial roles, which credit could then be enhanced by a variety of quantitative attributes, such as local residence, broadcast experience and minority ownership.

[9] Thus, these criteria are somewhat analogous to those proposed in the Comments of Susan M. Bechtel, filed with the Commission in this proceeding on January 26, 1998.

7. Auxiliary power facilities; and

8. In addition, incumbent renewal applicants should be scrutinized to determine whether the incumbent licensee deserves a "renewal expectancy", which should only be awarded for ""substantial performance" during the license term.

In assessing whether an incumbent license renewal applicant on file on or prior to May 1, 1995, is entitled to a "renewal expectancy" for "substantial" performance during the preceding license term, the Commission should utilize existing standards established in the law. More particularly, as the Court of Appeals stated in Citizens communications Center, supra:

> "Insubstantial past performance should preclude renewal of a license. The licensee, having been given the chance and having failed, should be through."
>
> Citizens Communications Center v. FCC, 447, F.2d at 1213.

The Commission should emphasize, consistent with existing law, that the strength of an incumbent licensee's renewal expectancy will be decisionally significant and will be a function of the licensee's past performance. Where the incumbent licensee is deemed to have rendered substantial, but not superior service, the alleged "renewal expectancy" should take the form of a mere comparative preference to be weighed against other factors. An incumbent which is found to have performed in a clearly superior manner would receive a strong renewal expectancy preference. However, an incumbent which is found to have rendered only minimal service would receive no preference whatsoever. See Central Florida Enterprises, Inc. v. FCC, 683 F.2d 503 (D.C. Cir. 1982), cert. denied, 460 U.S. 1084 (1983).

Consistent with numerous decisions,[10] the Commission should articulate clearly that a licensee's record of compliance with the Communications Act and the Commission's Rules and policies will be a major decisional factor in assessing the incumbent licensee's past performance on a comparative basis. A record of conformance with Commission Rules and policies can and will have deep impact on an incumbent licensee's claimed renewal expectancy. See, e.g., Central Florida Enterprises, Inc. v. FCC, supra, 683 F.2d at 509, and the Commission should so emphasize. Depending on the severity, misconduct should diminish any claimed renewal expectancy. See Valley Broadcasting Company, 4 FCC Rcd 2611 (Rev. Bd. 1989), review denied, 5 FCC Rcd 499 (1990), aff'd sub nom., Hernstadt v. FCC, 919 F.2d 182 (D.C. Cir. 1990). Furthermore, it is well established in existing law that a claimed renewal expectancy can be diminished for misconduct at stations other than the station under consideration in a comparative proceeding, and the Commission should so re-emphasize in this rulemaking proceeding.

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[10] Including, without limitation, Metroplex Communications Inc., 4 FCC Rcd 8149 (Rev. Bd. 1989), review denied, 5 FCC Rcd 5610 (1990), aff'd sub nom; Southeast Florida Limited Partnership v. FCC, 947 F.2d 505 (D.C. Cir. 1991).

V. Conclusion

In light of all the foregoing, it is respectfully submitted that the public interest, convenience and necessity would best be served by expeditious adoption by the Commission of the proposals set forth herein by Simon T.

Respectfully submitted,

SIMON T

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February 17, 1998

CERTIFICATE OF SERVICE

I, Mary Odder, a secretary in the law firm of Kaye, Scholer, Fierman, Hays & Handler, LLP, do hereby certify that on this 17th day of February, 1998, a copy of the foregoing Reply Comments of Simon T was sent via U.S. Mail, postage prepaid, to the following:

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